**UNCONSTITUTIONALITY OF ARTICLE 335-B OF DECREE NUMBER 06-2017 OF THE HONDURAS PENAL CODE**

**MEMORIAL AMICUS CURIAE**

**SUPREME COURT OF JUSTICE OF HONDURAS**

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| FIONNUALA NÍ AOLÁIN UNITED NATIONS SPECIAL RAPPORTEUR FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS WHILE COUNTERING TERRORISM |

**INTRODUCTION**

1. Fionnuala Ni Aolain, United Nations Special Rapporteur on Promotion and Protection of Human Rights while Countering Terrorism (Special Rapporteur) respectfully submits this memorial as amicus curiae.
2. This case represents a challenge to the constitutionality of Article 335 B of the Penal Code which punishes certain forms of expression  in the name of  countering  terrorism.  Its importance lies in the extent to which such punishment observes international norms established to demarcate and define those forms of expression which are properly punishable and those which are not.  For a democratic society to exist, the rights of citizens to create or receive expression depend on how well the legislature and the courts respond to the need to make those definitions, and how well the executive respects and enforces those definitions.
3. This memorial amicus curiae will first describe the Special Rapporteur’s mandate and then summarize the jurisprudence of some international legal tribunals relevant to assisting this court to make such definitions.
4. Special Rapporteurs consist of independent experts appointed by the UN Human Rights Council, a subsidiary organ of the UN General Assembly.  The mandate of the Special Rapporteur herein includes, among other things, (1) the need for greater clarity in respect to the legal relationships between national security regimes and international s legal  regimes (human rights, international humanitarian law and international criminal law), and (2) advancing the rights and protections of civil society in the fight against terrorism.

**LAWS PUNISHING EXPRESSION MUST BE CLEAR, PRECISE,
ACCESSIBLE, NECESSARY AND PROPORTIONATE**

1. The Inter-American Court of Human Rights and the European Court of Human Rights interpret the similar protections of freedom of expression guaranteed, respectively, in Article 10 of the European Convention on Human Rights, and Article 13 of the American Convention on Human Rights. Both Courts have considered the question of what expression must be punished or prevented in order to avoid social harms. In Olmedo Bustos v. Chile,[[1]](#footnote-1) the Inter‑American Court set a standard to ensure protection for expression which was controversial, shocking, unpopular or offensive to governments. The Inter‑American Court echoed and adopted the foundational doctrine announced in 1976 in Handyside v. United Kingdom.[[2]](#footnote-2) In construing Article 10 of the European Convention on Human Rights, the European Court held:

The Court’s supervisory functions oblige it to pay the utmost attention to the principles characterizing a ‘democratic society’. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’. This means, amongst other things, that every ‘formality’, ‘condition’, ‘restriction’ or ‘penalty’ imposed in this sphere must be proportionate to the legitimate aim pursued.

1. It follows that in order to protect such expression, laws which purport to punish or prevent expression must undergo strict scrutiny. Is the law sufficiently precise to enable the citizen to foresee the consequences which any given action may entail? In Observer and Guardian v. United Kingdom,[[3]](#footnote-3) the European Court held that rules which authorize prior restraints on publication of expression must specify with “sufficient precision” for the restraint to be compatible with the criterion of foreseeability. The guarantee of freedom of expression is a principle, and any exceptions or qualifications to that principle must be strictly and narrowly construed; the government must establish convincingly the need for any restrictions. This is also the teaching of Sunday Times v. United Kingdom.[[4]](#footnote-4) There the court found that the English law of contempt of court was deficient since it was not formulated with sufficient precision to enable a citizen to regulate his conduct to foresee to a reasonable degree the consequences of any action.
2. These watershed cases affirm that the government bears the burden to prove that any such law is necessary in a democratic society and is clear, certain, predictable and accessible. Such a law, moreover, must be proportional to a government’s legitimate aim. The Inter‑American Commission on Human Rights has emphasized the criteria of necessity and proportionality as follows:

278. With respect to the requirement of “necessity,” the Inter‑American Court of Human Rights has interpreted this to mean that a subsequent penalty is more than just “useful,” “reasonable” or “desirable.” Rather, the government must show that such a penalty is the least restrictive of possible means to achieve the government’s compelling interest. The penalty “must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees.” Moreover, the provision “must be so framed so as not to limit the right protected by Article 13 more than is necessary. … [T]he restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it.” This is an extremely high standard and any provisions imposing subsequent liability for the exercise of freedom of expression must be carefully examined using this proportionality test in order to prevent undue limitations of this fundamental right.” (citations omitted).[[5]](#footnote-5)

1. These criteria narrowly restrict government’s power to punish expression. Where the law punishing or preventing expression fails to meet these criteria, both Courts typically find that the respondent government violated the citizen’s rights of freedom of expression.
2. These criteria have been adopted and applied by the Inter‑American Court in a series of cases.
3. Under Article 13, “[e]veryone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”[[6]](#footnote-6) Therefore, “those who are protected by the Convention not only have the right to seek, receive, and disseminate ideas and information of any kind, but also to receive information and be informed about the ideas and information disseminated by others.”[[7]](#footnote-7) This protection is particularly important, the Court has recognized, with respect to dissemination of information and opinions about the performance of the government, high ranking officials, and other matters of significant public interest.[[8]](#footnote-8)
4. The Convention does allow for limited restrictions on freedom of expression, that is “liabilities imposed by law for abusive exercise” of this right.[[9]](#footnote-9) However, the imposition of such liability is only valid if, among other things, (1) the grounds for liability are expressly and precisely defined by law and (2) the grounds for liability are “necessary to ensure” a legitimate end, such as the protection of national security or public order[[10]](#footnote-10)
5. First, particularly in the case of restrictions of a criminal nature, any restrictions must be formulated “in an express, accurate, and restrictive manner.”[[11]](#footnote-11) Even in the case of civil restrictions, the “law must be formulated with sufficient precision to enable people to regulate their conduct so as to be able to predict with a degree that is reasonable under the circumstances, the consequences that a given action may entail.”[[12]](#footnote-12) Criminal conduct must be “delimited and distinguishable from non-punishable acts or illegal acts punishable with sanctions other than criminal.” [[13]](#footnote-13)
6. In the absence of clear guidelines established by law, the Inter-American Court has recognized, there will be an “intimidating effect on the exercise of freedom of expression, as people choose to self-censor rather than risk brushing up against a vague line.[[14]](#footnote-14) Vague laws also allow for discriminatory application against certain disfavored groups.[[15]](#footnote-15)
7. With respect to the second requirement – necessity – the Inter-American Court has held that a State must “minimize restrictions on dissemination of information.”[[16]](#footnote-16) Therefore, any restriction may not go “beyond what is strictly necessary.”[[17]](#footnote-17) Necessary, in this context, means that no less restrictive means can achieve the desired end, not merely that a restriction is useful.[[18]](#footnote-18)
8. An illustration of a vague and overbroad criminal law which was found to violate applicants’ Article 10 rights of freedom of expression appears in Hashman and Harrup v. United Kingdom.[[19]](#footnote-19)  There the applicants had attempted to disrupt an English fox hunt by blowing a hunting horn to confuse the dogs.  The trial court found their behavior to be “contra bonos mores”, defined as behavior which is “wrong rather than right in the judgement of the majority of contemporary fellow citizens.” The trial court ordered the applicants not to breach the peace or behave contra bonos mores for a year.  By a vote of 16-1, the Grand Chamber of the European Court found a violation of Article 10 because the concept of contra bonos mores is so broadly defined as to violate the requirement of foreseeability. The law did not give the applicants sufficiently clear guidance as to how they should behave or express themselves.

Article 335B

1. With these international norms having been presented, it is appropriate to evaluate the provisions of Article 335B of the Penal Code. In particular, we address that language which punishes expression which “makes apology, exaltation or justification of the criminal offense of terrorism.”[[20]](#footnote-20)
2. On February 23, 2017, the Inter-American Commission on Human Rights, its Special Rapporteurship on Freedom of Expression and the Office of the UN High Commissions for Human Rights in Honduras issued a joint press release highly critical of this language: it suffers from “ambiguity”; it is overbroad since it “facilitate(s) broad interpretations which can lead to sanctions over conducts which do not correspond to the seriousness of the criminal offense of terrorism.” The vice of such “broad, vague or ambiguous” provisions is that they allow “arbitrary application in different contexts, including public demonstrations and the defense of human rights….” states must use “strict, precise and unequivocal terms” in defining what expression is punishable.
3. The joint press release marks a clear distinction, however, between such overbroad, ambiguous, and vague expression, on the one hand, and expression which incites to violence, on the other hand. Incitement expression may be punished only where “it is intended to incite imminent violence…is likely to incite such violence and there is a direct and immediate connection” between the expression and the “likelihood of occurrence of such violence.” Even here, actual incitement to terrorism “must be backed up by actual truthful, objective and strong proof … that the person had the clear intention of committing a crime and the actual, real and effective possibility of achieving this objective.” This would necessarily exclude expressions of opinion “even if that opinion was hard, unfair or disturbing.”[[21]](#footnote-21)

**The Attorney General’s Position**

1. In its decision, the Attorney General seems to argue that 335B is unconstitutional only to the extent that it punishes expression by journalists under certain circumstances, such as when performing journalistic functions and social responsibilities; as applied to others it is constitutional.
2. The decision fundamentally misunderstands the Inter-American Court’s prior “Dual Dimension” jurisprudence. The social dimension of the “Dual Dimension” construct “includes the right of each person to seek to communicate his own views to others, as well as the right to receive opinions and news from others. For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinions.”[[22]](#footnote-22)
3. The Court expressly rejected a distinction based on “the circumstance whether or not that right [freedom of expression] is exercised as a paid profession.”[[23]](#footnote-23) Instead it ruled that the Convention provides a right “to receive information from any source without interference.”[[24]](#footnote-24)
4. The Commission has stated, since 2002, that there is no distinction between members of traditional media organizations and others communicating online.[[25]](#footnote-25) As the Commission noted in a report last year, the internet represents a “world where anyone can be an author and anyone can publish and it helps them communicate, collaborate and exchange views and information. This represents, the ‘democratization’ of freedom of expression as public speech is no longer moderated by professional journalists or gatekeepers.” [[26]](#footnote-26)
5. Therefore, to preserve access to all sources of information, including those whose only credential is their willingness to state an opinion, the Attorney General’s distinction is untenable.[[27]](#footnote-27)

**CONCLUSION**

1. The language in Article 335B which punishes expression which “makes apology, exaltation or justification of the criminal offense of terrorism” is not consistent with the requirements of clarity, precision, accessibility, necessity and proportionality.

Filed for the Special Rapporteur by her representatives in the proceeding.

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1. February 5, 2001, ¶69, Series C No. 73. [↑](#footnote-ref-1)
2. 1 E.H.R.R. 737 (1976) [↑](#footnote-ref-2)
3. 14 E.H.R.R. 155 (1992) [↑](#footnote-ref-3)
4. 2 E.H.R.R. 245 (1979) [↑](#footnote-ref-4)
5. Report on Terrorism and Human Rights, IACHR, October 22, 2002 [↑](#footnote-ref-5)
6. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (hereinafter, “Convention”), Art. 13(1). [↑](#footnote-ref-6)
7. Kimel v. Argentina, May 2, 2008. ¶ 53, Series C No. 177 [↑](#footnote-ref-7)
8. Tristán Donoso v. Panamá, Jan. 27, 2009, ¶¶ 121, 123, Series C No. 193; cf. Connick v. Myers, 461 U.S. 138, 145 (1983) (“speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection” (internal quotation marks omitted). Indeed, the Inter-American Court has recognized freedom of expression as “a cornerstone upon which the very existence of a democratic society rests . . . . a society that is not well informed is not a society that is truly free.” Compulsory Membership, ¶ 70, Series A No. 5. [↑](#footnote-ref-8)
9. Compulsory Membership, ¶ 35, Series A No. 5. [↑](#footnote-ref-9)
10. Compulsory Membership, ¶¶ 39-40, Series A No. 5; cf. Convention, Art. 13(2). [↑](#footnote-ref-10)
11. Kimel, ¶ 63, Series C No. 177. [↑](#footnote-ref-11)
12. Fontevecchia v. Argentina, Nov. 29, 2011, ¶ 90, Series C. No. 238 [↑](#footnote-ref-12)
13. Castillo-Petruzzi v. Peru, ¶ 121, May 30, 1999, Series C No. 52. [↑](#footnote-ref-13)
14. Catrimán v. Chile, May 29, 2014, ¶ 376, Series C No. 279; cf.Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (“Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." (internal quotation marks and alteration omitted)); NAACP v. Button, 371 U.S. 415, 433 (1963) (“The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.”) [↑](#footnote-ref-14)
15. Catrimán, ¶ 376, Series C No. 279; cf.Grayned, 408 U.S. at 109 (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”). [↑](#footnote-ref-15)
16. Fontevecchia, ¶ 45, Series C. No. 238 [↑](#footnote-ref-16)
17. Kimel, ¶ 53, Series C No. 177 [↑](#footnote-ref-17)
18. Compulsory Membership, ¶ 79, Series A No. 5; cf. Sable Commc’ns v. FCC, 492 U.S. 115, 126 (1989) (“It is not enough to show that the Government’s ends are compelling; the means must be carefully tailored to achieve those ends.”) [↑](#footnote-ref-18)
19. 30 E.C.H.R.R. 241 (2000) [↑](#footnote-ref-19)
20. "Those who publicly or through means of communication or dissemination for the public make apology, exaltation or justification of the crime of terrorism or those who participate in its execution, or incite another or others to commit terrorism or finance it will be punished with a penalty from four to eight years in prison." [↑](#footnote-ref-20)
21. OAS, IACHR, Special Rapporteurship for Freedom of Expression, Joint Press Release R18/17. [↑](#footnote-ref-21)
22. Compulsory Membership, ¶ 32, Series A No. 5 (emphases added); *see also* *id.* ¶ 34 (“freedom of expression requires, in principle, that the communication media are potentially open to all without discrimination or, more precisely, that there be no individuals or groups that are excluded from access to such media”). [↑](#footnote-ref-22)
23. *Id.* ¶ 75 [↑](#footnote-ref-23)
24. *Id.* ¶ 84. Other courts have reached the same conclusion. Cf. Snyder v. Phelps, 580 F.3d 206, 219 n. 13 (4th Cir. 2009), aff’d, 562 U.S. 443 (2011) (“Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the ‘media.’”); Flamm v. Am. Ass'n of Univ. Women, 201 F.3d 144, 149 (2d Cir.2000) (holding that “a distinction drawn according to whether the defendant is a member of the media or not is untenable”). [↑](#footnote-ref-24)
25. Complaint before the Inter-American Court of Human Rights against Costa Rica. Case No. 12.367, ̈la

Nación ̈ Mauricio Herrera Ulloa and Fernan Vargas Rohrmoser, 28 January 2002. ¶ 97. [↑](#footnote-ref-25)
26. Report – Standards for a Free, Open, and Inclusive Internet, IACHR, Mar. 15, 2017, ¶ 81; cf. Citizens United v. FEC, 568 U.S. 310, 352 (2010) (“With the advent of the Internet and the decline of print and broadcast media ... the line between the media and others who wish to comment on political and social issues becomes far more blurred.”) [↑](#footnote-ref-26)
27. It is customary to note in the context of amicus filings that any submission by the Special Rapporteur is provided on a voluntary basis without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on Privileges and Immunities of the United Nations. Authorization for the positions and views expressed by the Special Rapporteur, in full accordance with her independence, was neither sought nor given by the United Nations, the Human Rights Council, the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies. [↑](#footnote-ref-27)